BOOK REVIEWS.

THE LAW OF CONTRACTS. By Edward Avery Harriman. Second Edition. Boston: Little, Brown & Co. 1901. pp. 385.

The writing of a book on the law of contracts which should, by an analysis and synthesis of its principles, present that law scientifically, and should, at the same time, assign to their proper positions, according to their weight and soundness, the decisions of the courts, would be a tremendous undertaking, requiring not only a thorough familiarity with the history of the subject and with the reported decisions, but also, and more particularly, a mind sufficiently large and clear and logical to separate the wheat from the chaff of recorded cases, and so well disciplined as not to be staggered by what might appear the hopeless confusion into which some of the topics, coming under this head, have been thrown by bad text books and worse opinions. Professor Harriman has not succeeded in accomplishing the task.

His book shows some painstaking work, and is of some value as furnishing a clear and orderly collection of authorities on the subject, and as affording a convenient index for the use of the practicing lawyer. The work is entitled to the praise, if it be praise, that it contains fewer errors and exhibits less carelessness than any other recent attempt to cover this field—as for example, "Clarke on Contracts." If it were a pioneer work on the law of contracts this treatise would be a most valuable addition to legal literature, and the effort would be entitled to the highest commendation, but coming at the end of a long line of similar works on that law, it can only be justified in so far as it adds something original in the way of investigation or systematization or scientific treatment. Considered from this point of view, the book is without excuse; and yet it should be said, in the same sentence, that it is far better and less likely to do harm than most of the works which have preceded it. If Professor Harriman had employed, in dealing with *all* the topics embraced in his work, the scientific method and the analytical treatment and the courageous logic which Professor Langdell has employed in dealing with that portion of those topics which he has treated in his "Summary of the Law of Contracts," the result would have been of inestimable value. Such a book would fill a crying need and would be of enduring influence on the law.

Thanks are due to Professor Harriman for saying clearly and succinctly what he has to say, and for not seeking to cover up with verbiage what he does not understand. This is one of the respects in which his book is better and more useful, and less dangerous than some other books on the subject. It is to be regretted that the work is not entirely free from those errors which could have been

avoided:—In his definition of "contract," and in his division of contracts into "executed" and "executory," and into "express" and "implied," Professor Harriman simply repeats the old confusions, without adding anything by way of enlightenment or to extricate us from previous unscientific use of terms. It is not likely to aid the student, in learning the law of contract, to attempt to distinguish between "contractual obligation" and "contract," as Professor Harriman does on his first page. Does it convey any clear idea to the student or layman to say that a "contractual obligation is that legal obligation which is the result of a voluntary act on the part of the person bound and which is defined by that act"; or to say that "a contract is a promise or agreement enforcible by law"? We are not advanced in our knowledge by such definitions. It is like saying that a contract is a contract. Again, the phrase "executed contract" is a contradiction in terms; when a contract is executed, it ceases to be a contract. It is regrettable that the author continued the use of these terms "executed" and "executory," as applied to contracts, when they are so unscientific, and when the thoroughly scientific terms "uni-lateral" and "bi-lateral" define accurately all the distinctions which are sought to be conveyed by the use of the other terms. What the author has to say about the distinction between "expressed and implied contracts" is equally unsatisfactory. He quotes just enough of Blackstone in the section dealing with this topic (Section 11) to leave the subject more confused, even, than it is in the passage in Blackstone from which the quotation is made; because, while the distinction laid down by Blackstone is somewhat vague, yet there can be spelled out from his treatment of it the threefold classification of contracts in this regard, to wit: expressed contracts, contracts implied in fact and contracts implied in law. If this last mentioned classification were used and there were added to it the statement that "contracts implied in law" are not genuine contracts at all, but were so called for the purpose of the remedy, and the name "quasi-contracts" were substituted for the phrase "contracts implied in law," the classification would be scientific and would carry comprehension. No writer should be guilty of confusion on this point, since the clear and explicit exposition of the matter by Judge Lowrie in Hertzog *v.* Hertzog, 29 Pa. St. 465 at 467–468, or fail, in making his classification, to refer to that case.

A glance at two or three other portions of the work is all that is possible within the limits of a note of this kind, and yet, if the points selected for consideration are illustrative of the method of the treatise, it will be sufficient to furnish grounds for a just estimate of the value of the work. In dealing with the question of the performance of, or promise to perform, a contract obligation as a consideration, the author seems to oppose the view that such performance or promise to perform an existing obligation cannot be a consideration for a new promise, on the ground that (Section 124) "the effect of this reasoning is, of course, to prevent B from acquiring any security that A will perform his con-

tract with C, no matter how much B may be interested in securing such performance by A; and also to prevent A from relying, in the least, upon B's promise in his further dealings with C." The fault here is twofold: it is unscientific and illogical to reason from effects to legal principles, and the premise on which the author's statement is based is not true; the proposition that the performance of, or the promise to perform, a contractual obligation, is no consideration for another promise, does not deprive any one, who wishes to secure a new promise to perform the same thing, of the power of doing so. If B in the case put wishes to secure a new promise from A that he will perform his contract with C, he can do so by giving, that is, delivering something to A as a consideration for such new promise, as, for example, five dollars, or a book. The passing of the title is a detriment to the person giving it, and is a good consideration for the new promise of A.

In Section 131, the author uses this language: "The right of the beneficiary of a subscription paper to enforce the subscription, has been denied even by the Court which has most widely departed from the rule that the consideration must move from the plaintiff" —citing Presbyterian Church *v.* Cooper, 112 N. Y. 517. The fact is that probably in no court, which allows the beneficiary of a contract to sue, are the circumstances under which such beneficiary is allowed to enforce the obligation so narrow and so closely confined as in the New York courts. The beneficiary of a contract is not allowed to sue in New York unless the obligation assumed by the promisor to the beneficiary is the same as the obligation which the promisee owed to the beneficiary. This is the doctrine of Lawrence *v.* Fox, 20 N. Y. 268, as limited and defined in Vrooman *v.* Turner, 69 N. Y. 280. The case of Little *v.* Banks, 85 N. Y. 258, went off on the ground of public policy. On the other hand, United States courts allow recovery in a suit by the beneficiary of any contract which may be said to have been made for the real benefit of the plaintiff. This last mentioned doctrine, it is obvious, would cover many more instances than the very limited New York doctrine.

In speaking of "The nature of rescission," after saying that "the term 'rescission' is loosely used," the author proceeds to this remarkable distinction: "Thus, if A sells B a cow with the privilege of returning the cow if she is not a Jersey, and the cow is not a Jersey, B may rescind his contract to pay for the cow by returning her to A. If, however, A sells the cow to B with the privilege of returning her if she does not give ten quarts of milk a day, B may discharge himself from his obligation to pay for the cow by returning her to A if she does not give the specified amount of milk. In the first case the contract is rescinded; in the second, it is discharged. In the first case, a condition subsequent attached to B's promise; in the second case, only to the obligation of B's promise." No comment is necessary. It is what might have been expected to follow the enunciation of the proposition by the author, in a line just preceding this quotation, that "A contract can be rescinded

only by reason of some fact existing at the time of its formation." It may be remarked in passing that the contract of rescission is a distinct, new contract and that rescission, properly speaking, has nothing whatever to do with anything existing at the time of the formation of the contract rescinded.

There is not space to refer to other instances in this treatise of the author's unscientific method. He has disclosed and unwittingly confessed it by the language which he uses, at the end of the volume, in Section 645: "To attempt to establish any theory of contract which does not rest on the rules and ideas governing the Courts in their actual decisions is a grave mistake. To construct a scientific theory upon those rules and ideas is possible only by the exclusion of the notion that the same principle must always govern classes of contracts which have a widely different history." Would it not be truer to say that a scientific theory could only be constructed by the inclusion of that very notion or fact, and by keeping it constantly in mind? It would seem that not only should the author of a treatise on the law of contracts bring everything to the test of the historical nature of a simple contract, but that, so far from being confused or diverted by "the rules and ideas governing the Courts in their actual decisions," he should brand such rules and ideas as unsound when they violate the historical characteristics of the simple contract as we have it—never forgetting to state, however, how far such decisions are of settled authority in the jurisdictions in which they were rendered.

A TREATISE ON THE PROCEDURE IN SUITS IN EQUITY IN THE CIRCUIT COURT OF THE UNITED STATES. By C. L. Bates. Chicago: T. H. Flood & Co. 1901. 2 vols.; pp. lxii, 599; 600–1407.

A treatise upon the subject of Equity Pleading and Practice as it exists in our Federal courts supplies a real need of both student and practitioner. The adoption, in many of our States, of systems of code pleading and practice in which the time honored principles of pleading in equity have been abandoned or ignored has rendered the preparation of pleadings and the conduct of a cause in equity almost an unknown art: and that, notwithstanding the fact that our Federal equity courts, in which occur much of the important litigation of the country have retained this ancient system of pleading and practice with comparatively slight modification. Notwithstanding this fact the profession has hitherto, with perhaps one exception, been without the aid of any treatise of real merit dealing with the subject.

Mr. Bates' work, though not without defects, is on the whole most commendable. In the opening chapters he points out the source and traces the development of the present system of pleading and practice in the Federal equity courts. In the succeeding chapters he deals with the subject in the logical way by first considering, in the discussion of each topic, the rule of pleading and practice as applied by the English courts of chancery, making for this purpose frequent though judicious use of the earlier writers, Redesdale, Smith and Daniel. He then discusses the application